No. 91-2032

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

TRANSOIL (JERSEY) LTD.,
Petitioner,

v.

BELCHER OIL COMPANY,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Does Rule 51 of the Federal Rules of Civil Procedure preclude an appellee from defending the judgment of the district court on a legal theory that was consistent with instructions that the appellee submitted but the district court refused to give because it believed that its general instructions covered the subject?

In such a case, where the evidence presented at trial is sufficient to permit plaintiff's recovery on a legal theory that was not set out in the jury instructions, may the court of appeals direct the entry of final judgment for the defendant/appellant without ordering a new trial under proper instructions?

Where a case has gone to the jury on a general damages charge (without objection from the defendant), does Rule 51 preclude the defendant from asserting on appeal that a component of the claimed damages should not have been considered by the jury?

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PETITION FOR A WRIT OF CERTIORARI

Transoil (Jersey) Ltd. ("Transoil"),[1] by its undersigned counsel, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS OF OTHER COURTS

The opinion of the court of appeals (App. 1a-14a) is reported at 950 F.2d 1115 (5th Cir. 1992). The court of appeals' denial of rehearing and rehearing en banc (App.

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[1] Transoil has no parent corporations or subsidiaries other than wholly-owned subsidiaries. Its claim in this case has now been assigned to BCB Holdings, which has no parent corporations or subsidiaries. *See* Sup. Ct. R. 29.1.

17a-18a) is not reported. The judgment of the district court (App. 15a-16a) was not accompanied by an opinion.

JURISDICTION

The judgment of the court of appeals was entered on January 16, 1992 (App. 1a), and a timely petition for rehearing was denied on March 23, 1992 (App. 17a-18a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1988).

RULE INVOLVED

Rule 51 of the Federal Rules of Civil Procedure provides:

> Rule 51. Instructions to Jury: Objection
>
> At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury. The court, at its election, may instruct the jury before or after argument, or both. No party may assign as error the giving or the failure to give an instruction unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter objected to and the grounds of the objection. Opportunity shall be given to make the objection out of the hearing of the jury.

STATEMENT

The Breached Contract and Transoil's Losses

This case arises out of a breached contract between respondent, Belcher Oil Company ("Belcher"), and petitioner, Transoil. The contract called for Belcher to deliver between 200,000 and 250,000 barrels (at Belcher's option) of number six fuel oil, at a price of $19.40 a barrel, from the Port Neches Fina refinery near Houston,

Texas, to a terminal at St. Eustatius Island, Netherlands Antilles. App. 2a. Transoil's payment was guaranteed by a letter of credit for the benefit of Belcher issued by Banque Paribas (Suisse) S.A. in Geneva, Switzerland. As part of the contract, Belcher agreed that the oil would contain no more than 200 parts per million of vanadium, a heavy metal with corrosive effects. App. 2a. The contract provided that neither party would be liable for lost profits or "special, indirect, consequential, punitive or exemplary damages." Trial Ex. 27, Record Excerpts of Appellee/Cross-Appellant at RE 5. The contract also provided that it would be governed by the laws of the State of Texas. *Id.* at RE 6.[2]

Shortly after the oil—245,592 barrels—arrived at St. Eustatius on January 18, 1986, it was discovered to contain more than the maximum allowed amount of vana-

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[2] Under Texas law, a distinction is drawn between "general" and "special" damages. The Texas courts have explained that "[g]eneral damages are those which naturally and necessarily flow from a wrongful act, are so usual an accompaniment of the kind of breach alleged that the mere allegation of the breach gives sufficient notice, and are conclusively presumed to have been foreseen or contemplated by the party as a consequence of his breach of contract. Special damages arise naturally but *not necessarily* from the breach, are so unusual as to normally vary with the circumstances of each individual case, and must be shown to have been contemplated or foreseen by the parties." *Hess Die Mold, Inc.* v. *American Plasti-Plate Corp.*, 653 S.W.2d 927, 929 (Tex. Ct. App. 1983) (emphasis in original) (citing *Sherrod* v. *Bailey*, 580 S.W.2d 24, 28 (Tex. Civ. App. 1979); *Anderson Dev. Corp.* v. *Coastal States Crude Gathering Co.*, 543 S.W.2d 402, 405 (Tex. Civ. App. 1976); *Sterling Projects, Inc.* v. *Fields*, 530 S.W.2d 602, 605 (Tex. Civ. App. 1975)). The *Hess* court, quoting the definition of "incidental" and "consequential" damages in U.C.C. § 2-715, Tex. Bus. & Com. Code § 2.715, observed that "the common law concept of 'special damages' has been embodied in the Code definition of 'consequential' damages" and held that the cost to cover for a breach of contract was a "general" rather than a "special" damage. *Cf.* 1A William V. Dorsaneo, III, *Texas Litigation Guide* ¶ 21.04[1] at 21-23 (1992) ("Special damages cover losses other than the value of the other party's performance.").

dium. (The jury's verdict that Belcher breached the contract by delivery of "off spec" oil was not disturbed by the district court or court of appeals, *see* App. 4a, 7a, 15a, and is not at issue in this Court.)

Upon discovery that the oil was "off spec," the parties conducted a series of retests, and, at the same time, Transoil attempted to negotiate a settlement with Belcher. App. 3a. However, settlement efforts were hampered by quickly declining spot market prices for oil. App. 3a.[3] Each of Transoil's offers of settlement was either rebuffed or responded to only after the market price of oil had fallen and Transoil's damages (if it owned the oil) and Belcher's loss (if *it* still owned the oil) had thereby increased.

When negotiations on Transoil's offers of compromise did not produce a settlement, Transoil sent Belcher a telex rejecting the oil. App. 3a. Further negotiations did not result in a settlement, and, when Belcher threatened to draw on Transoil's letter of credit, Transoil brought suit in a Swiss court in February 1986 in an attempt to block payment of its letter of credit. App. 3a. The Swiss court granted Transoil a temporary restraining order but later dissolved it. On February 26, 1986, with the order dissolved, Banque Paribas paid Belcher's invoice under the letter of credit. App. 3a-4a.[4]

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[3] From January 20, 1986 (the Monday after the fouled oil was first tested) to March 13, 1986 (when it was resold) the price quoted by Platt's *Oilgram* for number six fuel oil on the Gulf Coast of the United States declined from $20 a barrel to $12.25 a barrel. Trial Ex. 335.

[4] The general rule with respect to letters of credit is that the issuing bank must pay upon the beneficiary's written demand accompanied by such documents as are specified on the face of the letter of credit. *See* Henry Harfield, *Bank Credits and Acceptances* 73 (5th ed. 1974) ("Because banks deal in documents and not in goods, and because the letter of credit is a contract distinct from any other, the bank's duty is to ascertain whether or not the invoice is as required by the terms of the credit."). There are certain ex-

Transoil therefore stood in the strange position of having rejected the goods only to have them forced upon it—an attempted rejection followed by a forced purported "sale" or involuntary "acceptance." Thereafter, on March 13, 1986, Transoil resold the oil for $11 a barrel. Transoil lost more than $2,062,000.[5]

The Trial

Transoil sued Belcher in the United States District Court for the Southern District of Texas, pursuant to that court's diversity jurisdiction and in accordance with the contract's choice-of-forum clause.

At trial, Transoil presented evidence to the jury showing that although it had rejected the oil, Belcher's drawing on the letter of credit forced it to take the oil anyway. The evidence was submitted to show the commercial reasonableness of Transoil's behavior, thus excusing Transoil from any consequences of a delay in reselling the oil in mitigation. Transoil consistently asserted that its damages were $8.40 per barrel, being the difference between the purchase price wrongfully extracted from it less what it had raised by reselling the non-conforming oil. Indeed, this theme appeared in Transoil's voir dire, opening statement, and closing argument.[6] Belcher coun-

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ceptions to this rule, as to which there is much controversy. *See id.* at 80-85. Even where the seller may draw on the letter of credit, doing so may still be wrongful vis-a-vis the buyer. Indeed, the purpose for providing letters of credit in commercial transactions is to permit the seller to be paid immediately, remitting controversies between the buyer and seller to subsequent adjudication in the courts. *See* John F. Dolan, *The Law of Letters of Credit* ¶ 3.07[4] (2d ed. 1991).

[5] The $8.40 per barrel difference between the $19.40 per barrel it was made to pay and the $11.00 it received, multiplied by 245,592 barrels, is, precisely, $2,062,972.80.

[6] *See* Trial Transcript Vol. 1 at 68-69 (voir dire) · Vol. 1 at 132 (opening statement); Vol. 9 at 75 (closing argument).

tered that Transoil had acted unreasonably by "playing the market," [7] and therefore did not act in a commercially reasonable manner.

Prior to trial, the parties had included proposed jury instructions in their Joint Pretrial Order (filed April 25, 1988) and in their First Amended Joint Pretrial Order (Dist. Ct. Docket No. 101, filed Feb. 2, 1990). Transoil's requested charge concerning damages included a provision concerning what are known as "difference-in-value" losses—the difference in value "to the wronged party." *See* Plaintiff's Requested Jury Instructions (Damages), Appended to First Amended Joint Pretrial Order. Belcher made no request concerning damages other than that the judge charge the jury that a plaintiff has a duty to mitigate damages.

Thus neither party proposed highly detailed instructions tracking its damage theories. Transoil did not ask for a jury instruction that parroted the words of any section of the Uniform Commercial Code; Belcher did not ask for a jury instruction laying out a theory that a drop in the market price per se results only in "consequential" damages regardless of the basis of the buyer's claim. But Transoil did propose two different sets of charges that it believed encompassed its theories of the case: one containing a charge that "the measure of damage is the difference between the original purchase price and the price at which the non-conforming oil could have been sold in good faith under the circumstances" (Dist. Ct. Docket No. 147, filed April 16, 1990 (App. 21a)); the other containing a charge that "[i]n determining the measurement of these damages, the jury may consider those damages resulting in the ordinary course of events, from the seller's breach as determined in any manner

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[7] *See* Trial Transcript Vol. 1 at 135 (Belcher's opening statement); Vol. 9 at 105 (Belcher's closing argument: "he was gambling. He was gambling on the market; and he waited too long; and he lost.").

which is reasonable." (Dist. Ct. Docket No. 152, filed April 17, 1990 (App. 21a)).[8]

The district court refused those requests and instead adopted an instruction that provided, in part, that the law "provides damages for breach in the amount of the expectancy interest of the wronged party" and that "the term expectancy damage means the general difference in value losses—the difference in value to the wronged party of the goods delivered and the goods as promised under the contract." App. 19a, 20a. Transoil objected to this charge because it "confuse[d] and limit[ed] the Jury's province." Transoil's Memorandum Regarding Jury Charge on Damages from Breach of Contract (filed April 1990).[9]

Belcher did not object at all to the jury charge on damages; nor did it request any charge specifying that the $8.40 per barrel damages claimed by Transoil were, in whole or in part, "consequential or incidental." [10] The jury, in special verdicts, concluded that Belcher breached its contract with Transoil and that Transoil was entitled to recover $2,062,000—approximately $8.40 per barrel. Interrogatories to the Jury (Dist. Ct. Docket No. 151, filed April 17, 1990).

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[8] The first of these charges embraces the theory of recovery of the purchase price (which had been wrongfully extracted) upon "rightful" rejection of the goods, as permitted by U.C.C. § 2-711(1), Tex. Bus. & Com. Code § 2.711(1). Recovery of the purchase price is the buyer's primary remedy; the amount raised by a good faith resale is a mitigating offset. The second charge is on an alternative theory, namely, that somehow the forced or involuntary "acceptance" caused by Belcher's wrongful draw on the letter of credit was still an "acceptance." The second charge is a paraphrase of U.C.C. § 2-714, Tex. Bus. & Com. Code § 2.714, catchlined "Buyer's Damages for Breach in Regard to Accepted Goods."

[9] Transoil again raised its objection to the damages instruction in the formal jury charge conference. Trial Transcript Vol. 9 at 6-7.

[10] Belcher's motion for a directed verdict had made that assertion.

In its motion for judgment notwithstanding the verdict, Belcher made a two-pronged attack on the jury's damage verdict. First, it argued that under *its* reading of the jury instruction, no evidence was presented to support the verdict because the only "rejection" measure of damages *submitted to the jury* was the difference between market price on the date of tender and contract price on the date of tender. Belcher thus took the view that the damages collectible as a consequence of Transoil's being unlawfully forced by Belcher to take and pay for the oil were the same as the "loss of bargain" damages that Transoil could have collected, following Transoil's proper rejection of the oil as nonconforming, if Belcher had refrained from improperly drawing on the letter of credit. Put another way, Belcher argued that, notwithstanding the jury's implicit conclusion that the oil was forced on Transoil, Transoil did not have the power to sell the oil for Belcher's account and obtain recovery of the purchase price extracted by Belcher's draw on the letter of credit, less the money raised by the resale of the oil. But section 2-711(1) of the U.C.C. (which is catchlined "Buyer's Remedies in General; Buyer's Security Interest in Rejected Goods") provides that if "the buyer rightfully rejects" the goods, "the buyer may . . . recover[] so much of the price as has been paid." Tex. Bus. & Com. Code § 2.711(1). This "general" remedy is clearly not "consequential" or "special" damages. *See* p. 3 n.2, *supra; contrast* U.C.C. § 2-715(2), Tex. Bus. & Com. Code § 2.715(2).

Second, following the same approach, Belcher asserted that "[a]ll of the evidence was that the *difference* between the contract price and the resale price, was a *consequence* of the oil market drop and not the result of excess vanadium. Such damages are clearly consequential damages and indisputably barred by the contract between the parties." Belcher's Post-Judgment Motion for Judgment N.O.V. or, Alteratively, for New Trial at 4 (Dist. Ct. Docket No. 171, filed June 20, 1990).

Ironically, while Belcher asserted that Transoil—the victorious party—could not defend the judgment by pointing to a theory not set forth in detailed jury instructions, Belcher itself attacked the judgment by testing the jury's verdict against a hypothetical instruction defining consequential damages, which Belcher never requested, but which, after verdict and judgment, it evidently wished that it had requested. Although the jury's consideration of the evidence tendered by Transoil was hardly restricted under the general instruction on consequential damages given by the district court, it was inconsistent with the more specific hypothetical charge, which Belcher never presented. Belcher thus presented its attack on the jury verdict as though it were an attack on the suffciency of the evidence to support the damage award (apart from the verdict of liability) rather than what it really was—a belated complaint about the jury instructions. Ironically, on certain obvious theories, most notably U.C.C. § 2-711, the evidence was amply sufficient to support the award.

Belcher's Appeal

Belcher listed eighteen points of error on appeal.[11] On the issue of damages, it asserted that the jury had improperly failed to distinguish between what are known as "difference-in-value" losses and what it claimed to be "consequential" losses under U.C.C. § 2-714(1), Tex. Bus. & Com. Code § 2.714(1). Brief of Appellant at 25-26 (Jan. 10, 1991). It conceded that "there may have been alternative remedies available to Transoil under the UCC (*e.g.*, Articles [sic] 2-711 and 2-714)," but asserted

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[11] Belcher also appealed against E.W. Saybolt & Co., Inc., a third-party defendant Belcher had impleaded; Belcher dismissed its appeal against Saybolt, which is no longer a party to the action.

Transoil also cross-appealed from the district court's computation of prejudgment and postjudgment interest. Brief of Appellee/Cross-Appellant at 46-48 (Feb. 22, 1991). (Because no aspect of the cross-appeal is at issue in this Court, we shall refer to Transoil's brief in the court of appeals as "Brief of Appellee.")

that these were "of no moment" because Transoil did not request detailed instructions tracking the language of these two provisions. Brief of Appellant at 27.[12]

Belcher also argued that the $8.40 per barrel loss suffered by Transoil "was a *consequence* of the general decline in oil prices wholly unrelated to" Belcher's breach of the contract. Brief of Appellant at 26 (emphasis in original). Of course, Belcher had not requested or received any instruction to that effect; it had only received, without objection, the general instruction that "the contract between Transoil and Belcher specifically excludes any additional consequential or incidental damages, including, but not limited to interest." *See* p. 7, *supra*; App. 20a.

Transoil defended its judgment by pointing to well-settled U.C.C. law that allows the buyer of non-conforming goods—particularly one that has rejected them—to "recover the purchase price he paid, reduced by the amount realized in a commercially reasonable resale." Brief of Appellee at 23-24. Transoil relied on precedent under several provisions of the U.C.C., including sections 2-706, 2-711, and 2-714, supporting the unremarkable proposition that "where the facts support alternative remedies, the courts do not require compartmentalization under a single label." Brief of Appellee at 23.

Transoil responded to the merits of Belcher's assertion that the $8.40 per barrel loss was merely "consequential" damages and also pointed out that "Belcher failed

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[12] Belcher's concession was correct; as noted above, section 2-711(1) clearly provides an alternative to accepting the goods and recovering damages for their nonconformity to specification (which is the damages measure under section 2-714(1)): under section 2-711, a buyer may—where "rightful"—"reject" the goods and recover the purchase price. That is, of course, our case. The first of the two sets of instructions requested by Transoil charged the theory of recovery specified in section 2-711(1), although it did not slavishly follow section 2-711(1)'s words. *See* p. 7 n.8, *supra*; App. 21a.

below to request any instruction defining 'consequential damages' or any interrogatory requiring a finding by the jury on this issue." *Id.* at 29.

In an opinion issued January 16, 1992, the court of appeals agreed with the trial judge that the jury had before it sufficient evidence to conclude that Belcher had breached its contract; it reversed the judgment, however, holding that "the award is unsupported by the evidence *under the legal theory upon which the case was tried and submitted to the jury.*" App. 7a; 950 F.2d at 1119 (emphasis added). The court declined to consider Transoil's uncontested assertion that the jury verdict was supported by section 2-711 (and other sections) of the U.C.C. "because Transoil failed to request an instruction pursuant to this section from the district court." App. 9a; 950 F.2d at 1120.

The court did not pause to consider this Court's repeated admonition that an appellee may argue on appeal any properly preserved point in support of its judgment. *See United States* v. *American Ry. Express Co.*, 265 U.S. 425, 435 (1924) (Brandeis, J.). Instead, invoking Rule 51, the court declared that Transoil could not defend the judgment on grounds that had not been included, element-by-element, in the jury instructions. App. 9a-10a; 950 F.2d at 1120. In short, the court concluded as follows:

> The fact that Transoil now points to a theory of recovery for which the evidence might support recovery is of no moment. Transoil failed to ask the district court to present this theory to the jury and, the jury did not consider the evidence under this theory. We cannot say what findings the jury would have made on the plaintiff's claims under such a theory.

App. 14a; 950 F.2d at 1122.

The court paradoxically ignored Transoil's plea that it apply the principles of Rule 51 to the *appellant's* as-

sertions about consequential damages. The appellant had not objected to the jury instruction on damages or consequential damages (as Rule 51 requires) but was now collaterally attacking the instruction's lack of specificity.

Astoundingly, the court declined to send the case back to the district court for a new trial (in whole or, more properly, on damages alone) under the highly specific damages instructions the court of appeals believed should have been given to the jury. Instead, the court entered final judgment in favor of Belcher and against Transoil, even though it found no reason to disturb the jury's finding—on evidence sufficient to support its verdict—that Belcher had breached its contract by tendering fouled oil, drawing the letter of credit, and thus forcing the oil on Transoil at a time when the market price for oil, clean or fouled, had fallen well below the contract price. Although U.C.C. § 2-711 clearly provides for recovery of the purchase price less resale proceeds in these circumstances, Transoil was to leave court empty-handed.[13]

REASONS FOR GRANTING THE WRIT

The court of appeals' opinion warrants this Court's attention for three separate reasons, two of which are related to Rule 51 of the Federal Rules of Civil Procedure. First, the court of appeals mistakenly invoked Rule 51 to preclude an appellee from defending its judgment—an unprecedented departure from well-settled practice that warrants reversal. Second, the court, *sub silentio*, allowed an appellant to attack a jury instruction on grounds not properly raised by it in the district court. The consequences are that a defendant—held by a jury and court judgment to have breached a contract and improperly drawn a letter of credit at a time when the price

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[13] Transoil's petition for rehearing and suggestion of rehearing en banc were denied on March 23, 1992.

of oil had declined—emerged from the case with no judgment for damages against it. Though not acknowledged as a conflict, the Fifth Circuit's holding in this respect conflicts with those of this Court and of courts of appeals.

A third reason for granting the writ transcends Rule 51. While under Rule 51 it would have been error for the court of appeals even to have set aside the jury verdict on damages (and the district court's judgment) and award a new trial, the court of appeals grossly compounded its error by directing that judgment n.o.v. be entered for the defendant. This is contrary to the clear holdings of this Court that where an alternative theory of recovery not passed on by the jury (if one credits the court of appeals here) is obvious, the proper consequence of an insufficiency of the evidence on which the theory under which the damage issue *was* submitted to the jury is a new trial.

1. *The Court of Appeals' Refusal to Allow the Appellee to Defend Its Judgment.*—It is a fundamental tenet of appellate litigation that an appellee may defend its judgment on any ground that was presented below, whether or not that ground was relied on or even considered by the trial court. This Court has repeated that principle time and time again. *See, e.g., Blum* v. *Bacon*, 457 U.S. 132, 137 n.5 (1982) ("an appellee may rely upon any matter appearing in the record in support of the judgment below"); *Washington* v. *Confederated Bands & Tribes of Yakima Indian Nation*, 439 U.S. 463, 476 n.20 (1979) ("[a]s the prevailing party, the appellee was of course free to defend its judgment on any ground properly raised below whether or not that ground was relied upon, rejected, or even considered by the District Court"); *Massachusetts Mut. Life Ins. Co.* v. *Ludwig*, 426 U.S. 479, 480-81 (1976); *Dandridge* v. *Williams*, 397 U.S. 471, 475 n.6 (1970) ("[t]he prevailing party may, of course, assert in a reviewing court any ground in support of his judgment, whether or not that ground was relied upon

or even considered by the trial court"); *Jaffke* v. *Dunham*, 352 U.S. 280, 281 (1957) ("[a] successful party in the District Court may sustain its judgment on any ground that finds support in the record"); *United States* v. *American Ry. Express Co.*, 265 U.S. 425, 435 (1924) ("[t]he appellee may . . . urge in support of a decree any matter appearing in the record, although his argument may involve an attack upon the reasoning of the lower court or an insistence upon matter overlooked or ignored by it").

The court of appeals ignored this axiom. It precluded Transoil—the appellee—from relying on Texas law that supported its judgment and that was fully consistent with the evidence presented to the jury. And it did so notwithstanding Transoil's request that the district court give instructions that embodied its theory of damages. Finally, the court of appeals, at the instance of the appellant, precluded a new trial, whether on all issues or on damages. The result was that the plaintiff, victorious in the district court, having won a jury verdict and judgment on substantial evidence of Belcher's breach of contract, was to be denied any recovery, even though its position was fully consistent with applicable law. This, simply because the case was submitted to the jury on a general damages instruction following the district court's refusal to give more specific instructions on the plaintiff's theory.

Remarkably, the court of appeals' basis for this outcome was the provision of Rule 51 of the Federal Rules of Civil Procedure that "[n]o party may *assign as error* the giving or the failure to give an instruction unless the party objects thereto before the jury retires to consider its verdict." (Emphasis added.) We have found no case that has applied Rule 51 (or its counterpart, Rule 30 of the Federal Rules of Criminal Procedure) to prevent the *appellee* from defending a favorable judgment on any appropriate legal basis. Certainly the cases the court of

appeals pointed to did not bar appellees from defending their judgments. They were simply cases applying Rule 51 to *appellants* who complained of jury instructions that they had not objected to. *Farrar* v. *Cain*, 756 F.2d 1148, 1150 (5th Cir. 1985) (appellants' "[f]ailure to object to the jury charge in the trial court precludes review on appeal"); *Fisher* v. *Indiana Lumbermens Mut. Ins. Co.*, 456 F.2d 1396, 1400-01 (5th Cir. 1972) (failure to object to a jury charge as required by Rule 51 would bar appellant from "appellate complaint").

Ironically, Transoil *did* object to the jury instruction on the ground that better ones could have more clearly articulated its damage theory to the jury. The court of appeals dismissed these proposed instructions as irrelevant because they did not track in detail the elements of the U.C.C. provisions that Transoil pointed to in support of its position.

By applying Rule 51 to preclude Transoil from defending its judgment, the court of appeals departed dramatically from this Court's teachings. In similar situations, this Court has not hesitated to intervene. The case of *Massachusetts Mutual Life Insurance Co.* v. *Ludwig*, 426 U.S. at 480-81, is illustrative. There, as here, the court of appeals held that the appellee in a diversity case was precluded from defending its judgment; that conclusion, as in this case, rested on a misapplication of a rule of procedure (there, that the appellee did not cross-appeal). This Court, in a *per curiam* opinion following the rule of *American Railway Express*, granted the petition for writ of certiorari, summarily vacated the judgment of the court of appeals, and remanded the case for consideration of the state-law question that the court of appeals had mistakenly declined to consider.

Such a course of action certainly would be appropriate here: Transoil's damages theory (that it was entitled to recover the entirety of the purchase price extracted from it less the proceeds of its commercially reasonable resale

of the oil) surely was preserved in the district court. Indeed, it formed the basis for Transoil's entire case on damages and was even the subject of specific requests and objections by Transoil at the jury charge conference. There was no reason to preclude Transoil from presenting law to support its theory in the court of appeals. On the contrary, the court of appeals' opinion upsets settled expectations about the conduct of litigation. As one appellate practitioner has observed, "[r]ules of procedure, found in judicial decisions or elsewhere, should be well understood if they are to serve their purpose; they should not by their lack of explanation cause counsel reasonably conforming to what the main line of authority declares to be the governing principle to make errors fatal to their client's position." Robert L. Stern, *When to Cross-Appeal or Cross-Petition—Certainty or Confusion?*, 87 Harv. L. Rev. 763, 773 (1974).

By holding that a prevailing party may not argue controlling law that was not laid out element-by-element in the jury charge that the district court insisted on giving (*see* App. 9a-10a; 950 F.2d at 1120), the court of appeals has created a precedent that will tend to encourage litigants—out of an abundance of caution—to request formalistic and legalistic jury instructions replete with unnecessary detail. But a jury charge should not be designed to parrot the "magic language" in a statute or a court of appeals opinion. As Judge Wyzanski observed, "the object of a charge to a jury is not to satisfy an appellate court that you have repeated the right rigmarole of words, but to try to make jurors who are laymen understand what you are talking about." *Cape Cod Food Prods.* v. *National Cranberry Ass'n*, 119 F. Supp. 900, 907 (D. Mass. 1954). The court of appeals here has concluded that just the opposite is necessary. That conclusion will impose an unnecessary and unreasonable burden on trial lawyers and trial courts.

2. *Outflanking Rule 51.*—Though it did not acknowledge it, the court of appeals has put itself in direct con-

flict with the approach of this Court and several other circuits which have dealt with similar efforts by appellants to overturn damage awards. In doing so, it has undermined the salutary purpose of Rule 51. This Court has recognized that Rule 51 promotes "fairness to the trial court and to the parties." *Palmer* v. *Hoffman*, 318 U.S. 109, 119 (1943). In addition, it reduces the burden on the courts of appeals by precluding appellate review of jury instructions that were not timely objected to.[14]

Rule 51 ordinarily bars an appellant from attacking jury instructions to which it failed to object before the jury retired. This principle, of course, predates Rule 51. Thus, in *McDermott* v. *Severe*, 202 U.S. 600, 610 (1906), this Court, in reviewing a jury verdict, pointed to the "duty of the objecting party to point out specifically the part of the instructions regarded as erroneous." There, as here, the defendant argued on appeal that a certain kind of expense was not properly included in the jury's

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[14] The Court also has recognized Rule 51's "uncompromising language and the policies of fairness and judicial efficiency incorporated therein" in considering whether to pass on the merits of petitioners' arguments that were not the subject of objections to the jury charge. *City of Newport* v. *Fact Concerts, Inc.*, 453 U.S. 247, 255 (1981) (footnote omitted). As the Court demonstrated in several such cases, however, the Rule's effect is necessarily different in respect of this Court's jurisdiction (which is discretionary and which may be exercised "before or after rendition of judgment or decree" in any case in a court of appeals, 28 U.S.C. § 1254(1)) than when this Court is laying down rules governing the prosecution of appeals in the courts of appeals, where appeal is as of right. *See City of St. Louis* v. *Praprotnik*, 485 U.S. 112, 119-20 (1988) (" 'the decision to grant certiorari represents a commitment of scarce judicial resources with a view to deciding the merits of one or more of the questions presented in the petition' ") (quoting *City of Oklahoma City* v. *Tuttle*, 471 U.S. 808, 816 (1985)); *City of Springfield* v. *Kibbe*, 480 U.S. 257, 259 (1987) (per curiam) (dismissing writ as improvidently granted where petitioner did not object to jury instruction, even though "[t]here is doubtless no jurisdictional bar to our reaching it, whether or not the Court of Appeals did so").

damages verdict. This Court rejected that argument. "The charge in this respect was general, permitting a recovery for a pecuniary loss directly resulting from the injury. It would be very unfair to the trial court to keep such an objection in abeyance and urge it for the first time in an appellate tribunal." 202 U.S. at 611. The charge in this case, too, was a general charge. Belcher's assertion that the damages sought were, or were in part, "consequential" should have been the subject of an objection before the jury retired. Belcher should not be permitted to salvage its position by recasting the charge as if a never-requested charge in its favor on consequential damages had been given and then arguing that the evidence did not support the verdict.

In other circuits, when a defendant objects on appeal to the jury's inclusion of an element of expense in the plaintiff's damages, the objection must be accompanied by an appropriate jury instruction. Thus, in *Will* v. *Comprehensive Accounting Corp.*, 776 F.2d 665 (7th Cir. 1985), *cert. denied*, 475 U.S. 1129 (1986), the instructions did not ask the jury to consider specific questions about the plaintiffs' allegations of damage; that jury, like this one, "was simply told to find the plaintiffs' damages. . . . Although part of [appellant's] argument now may be construed as a claim that the jury could not award these costs . . . *it did not propose an instruction excluding these costs from consideration.*" 776 F.2d at 675 (emphasis added). The Seventh Circuit therefore held that the appellant could not attack a general verdict on the ground that certain kinds of damages should have been excluded unless it requested instructions to that effect: "[i]f a party could argue that the evidence was insufficient under the correct legal standard, this would be an indirect method of attacking the instructions, which we have just held defendants may not do." *Id.* That "indirect method of attacking the instructions"—prohibited by the Seventh Circuit —is precisely what the Fifth Circuit has allowed.

The Fourth Circuit reached a similar conclusion in *United States* v. *Board of Education of the County of Mineral*, 253 F.2d 760 (4th Cir. 1958). There, the plaintiff argued to the jury that it was entitled to the cost of replacement of condemned property. The government contended that "only market value could be considered in awarding damages." 253 F.2d at 761. The government complained of that portion of the jury charge allowing the jury to award consequential damages; because no objection was made in the district court, Rule 51 prohibited the government's appeal of the issue. Here, the only reason a different result appears to have been obtained is that the government was a more candid appellant than Belcher. While the government in that case admitted that the charge allowed the jury to consider evidence beyond "market value," Belcher twisted the instructions by asserting here that the instructions *forbade* the jury to consider anything other than market value. They did not, and if Belcher wished to preserve the issue for appeal, its duty to the district court was to object to the charge.

Unlike the Fourth and Seventh Circuits' approach, the Fifth Circuit's approach encourages unduly "creative" appellate advocacy; by casting its appeal as one directed to the "evidence" instead of to the failure of the charge to forbid *consideration* of the evidence, Belcher has succeeded in outflanking Rule 51. Other litigants may be expected to attempt to follow suit, thereby increasing the burden on the courts of appeals. Here, the "creative" appellate advocacy of Belcher—which made the silk purse of "no supporting evidence" out of the sow's ear of its trial counsel's failure to object to the general jury charge or to request an instruction on its theory that all of the damages claimed by Transoil were "consequential"—was rewarded not simply by a reversal of the judgment and new trial but by a rendition of judgment absolute in Belcher's favor. This, although Belcher had been adjudi-

cated to be the breaching party and although U.C.C. § 2-711 clearly provides—not under any rubric of "consequential" damages but as a primary, "general" remedy—for the recovery of the entirety of the purchase price paid in cases such as this. This is not a case about the sufficiency of the evidence, but a case about jury instructions. By causing the matter to be thus confused and by leading the court of appeals into disregarding the rule that an appellee may urge any legally acceptable theory in support of its judgment, Belcher was let off scot-free for its improper draw on the letter of credit.

This Court should confirm that Rule 51 precludes attack—collateral or otherwise—on jury instructions in the absence of proper objections. Most courts of appeals will allow such an attack only if there has been "plain error." [15] Indeed, the Ninth Circuit has gone further, declaring "that there is no 'plain error' exception in civil cases." *Hammer* v. *Gross*, 932 F.2d 842, 847 (9th Cir.), *cert. denied*, 112 S. Ct. 582 (1991). But here the Fifth Circuit did not even consider whether there was "plain error." Instead, it allowed Belcher to cast its objection as an attack on the sufficiency of the

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[15] *See Hobson* v. *Wilson*, 737 F.2d 1, 32 n.96 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1084 (1985); *Almonte* v. *National Union Fire Ins. Co.*, 787 F.2d 763, 767 (1st Cir. 1986); *Care Travel Co.* v. *Pan Am. World Airways*, 944 F.2d 983, 995 (2d Cir. 1991); *Bennis* v. *Gable*, 823 F.2d 723, 727 (3rd Cir. 1987); *Duty* v. *East Coast Tender Serv.*, 660 F.2d 933, 941-42 (4th Cir. 1981), *cert. denied*, 455 U.S. 945 (1982); *Guthrie* v. *J.C. Penney Co.*, 803 F.2d 202, 208 (5th Cir. 1986); *Woodbridge* v. *Dahlberg*, 954 F.2d 1231, 1237 (6th Cir. 1992); *Davis* v. *Consolidated Rail Corp.*, 788 F.2d 1260, 1267 (7th Cir. 1986); *Johnson* v. *Houser*, 704 F.2d 1049, 1051-52 (8th Cir. 1983); *Moe* v. *Avions Marcel Dassault-Breguet Aviation*, 727 F.2d 917, 924-26 (10th Cir.), *cert. denied*, 469 U.S. 853 (1984); *Pate* v. *Seaboard R.R.*, 819 F.2d 1074, 1082-83 (11th Cir. 1987); *American Hoist & Derrick Co.* v. *Sowa & Sons, Inc.*, 725 F.2d 1350, 1364 (Fed. Cir.), *cert. denied*, 469 U.S. 821 (1984).

evidence rather than what it was—an attack on the jury charge itself.

Of course, the Ninth Circuit's approach—which is the one that comports with the plain language of Rule 51—would have prohibited outright the result in this case: that approach also pretermits the time-consuming and almost always fruitless analysis of whether there was "fundamental" error. *See Wells Real Estate, Inc.* v. *Greater Lowell Bd. of Realtors*, 850 F.2d 803, 809 (1st Cir.) (First Circuit has never used "plain error" doctrine to overturn a jury verdict in a civil case), *cert. denied*, 488 U.S. 955 (1988). The Fourth and Seventh Circuits' approach—like this Court's decision in *McDermott*—prohibits an appellant from recasting the jury instruction and thereby raising issues concerning a charge not properly objected to. This limits the burden on courts of appeals and, at the same time, gives trial judges fair warning of potential error.

3. *Improper Entry of Judgment N.O.V. Precluding Retrial on an Available Damage Theory.*—At the most, the court of appeals should have remanded the case for a new trial. In *Weade* v. *Dichmann, Wright & Pugh, Inc.*, 337 U.S. 801, 808-09 (1949), this Court held that a court of appeals, on reversing the district court's erroneous instructions, should not have directed entry of judgment n.o.v., precisely because there were "suggestions in the complaint and evidence" of an alternative theory of liability, which had not been passed upon by the jury and which therefore justified the grant of a new trial. There were more than such "suggestions" here—there were clarifying instructions, proffered by Transoil but refused by the district court, embracing the theory. And that theory was amply supported by the evidence—the same evidence that led to the special verdict of liability.

In *Neely* v. *Martin K. Eby Constr. Co.*, 386 U.S. 317, 325 (1967), this Court observed that *Weade* "make[s]

it clear that an appellate court *may not* order judgment *n.o.v.* where . . . the record reveals a new trial issue which has not been resolved." (Emphasis added.)[16] And in *Iacurci* v. *Lummus Co.*, 387 U.S. 86, 87-88 (1967), this Court summarily vacated a court of appeals' decision reversing a district court's refusal to grant the defendant's motion for judgment n.o.v. There, too, the court of appeals erred in "directing entry of judgment for respondent" because the jury "might not have passed" on alternative theories of liability. 287 U.S. at 87-88. The Court therefore ordered the case remanded to the trial judge to determine whether the petitioner was entitled to a new trial.

Here, the court of appeals has done just what the Court prohibited in *Weade* and *Iacurci*. It has denied the plaintiff—who obtained a verdict and presented the jury with evidence that would suffice under an undisputedly correct theory—the opportunity to present that evidence to the jury under what the court of appeals considered to be the proper instructions. Although it concluded that it "cannot say what findings the jury would have made on the plaintiff's claims under such a theory," App. 14a; 950 F.2d at 1122, it entered a "take nothing judgment in favor of Belcher" anyway—in direct contravention of *Weade* and *Iacurci*.

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[16] The *Neely* court, even addressing a case where the court of appeals had concluded that the evidence was insufficient on any theory to support the verdict (not one where the evidence would have supported the verdict on one theory but not another), went on to caution that "where the court of appeals sets aside the jury's verdict because the evidence was insufficient to send the case to the jury, it is not so clear that the litigation should be terminated." 325 U.S. at 327.

CONCLUSION

This petition for a writ of certiorari should be granted.

Respectfully submitted,

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June 1992

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 90-2629

TRANSOIL (JERSEY) LTD.,
Plaintiff-Appellee,
Cross-Appellant,

v.

BELCHER OIL COMPANY,
Defendant-Third Party Plaintiff-Appellant, Cross-Appellee.

Appeals from the United States District Court
for the Southern District of Texas

Jan. 16, 1992

Before DAVIS and BARKSDALE, Circuit Judges, SCHWARTZ, District Judge: [1]

W. EUGENE DAVIS, Circuit Judge:

Appellant Belcher Oil Company (Belcher) appeals from a judgment entered on a jury verdict, awarding Transoil (Jersey) Ltd. (Transoil) $2,062,000 in damages for Belcher's breach of its contract to sell oil to Transoil. In this appeal, Belcher contends that the evidence at trial

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[1] District Judge of the Eastern District of Louisiana, sitting by designation.

was insufficient to support the jury's finding that Belcher breached the contract or to justify its calculation of damages. After a careful review of the record, we conclude that the evidence supports the jury's liability finding but does not support any damage award. We therefore reverse and render.

I.

In January 1986, Belcher entered into a contract with Transoil for the sale of 245,592 barrels of number six oil at a price of $19.40 per barrel. As a part of their agreement, the parties agreed that the oil would meet certain standards and specifications. Critical to this appeal, the contract provided that the level of the element vanadium in the oil would not exceed 200 parts per million (ppm). The parties appointed an independent inspector, E.W. Saybolt & Company (St. Eustatius), N.V. (Saybolt NV), to test the quantity and quality of the oil at the discharge port.

The oil in question was loaded on board the M/V JACINTH at the Port Neches Fina refinery near Houston, Texas and shipped to the Statia Terminals, St. Eustatius, Netherlands Antilles. Prior to shipping, Belcher hired an inspector other than Saybolt NV to test the quality of the oil at the load port. According to these test results, the oil contained 181 ppm of vanadium.

The M/V JACINTH arrived at St. Eustatius on January 18, 1986 and off-loaded the oil into a shore tank. During the off-loading, Saybolt NV took samples of the oil from the ship's various compartments and made a composite sample. Statia Labs, an affiliate of Transoil, tested the sample later that day in the presence of Saybolt NV representatives. Saybolt NV subsequently issued a "Report of Witnessed Analysis," verifying that Statia Labs' tests had determined the oil's vanadium content to be 257 ppm. The report indicated, however, that Saybolt NV did not verify the accuracy of the tests.

After the first discharge port test showed that the oil had excessive vanadium, the parties initiated a series of retests. Transoil had Statia Labs retest its composite sample and also a shore tank sample. Later that week, E.W. Saybolt, Inc. of Kenilworth, New Jersey (Saybolt-Kenilworth) and E.W. Saybolt, Inc. of Pasadena, Texas (Saybolt-Pasadena) also tested discharge port samples in their respective labs. In February 1986, Belcher commissioned SGS laboratories to test samples from the shore tank. Finally, in March 1986, at Transoil's request, Saybolt-Pasadena retested the shore tank samples using the IP-288 method. All of these retests, except the first Saybolt-Pasadena tests, concluded that the oil's vanadium content exceeded 200 ppm.

While the parties were having the oil retested, they also attempted to negotiate a settlement. On January 23, 1986, Transoil sent Belcher a telex proposing a $284,641.13 reduction in the contract price. Transoil indicated that it would use the difference to purchase oil with a low vanadium content to dilute the oil and thus bring it within specification. When negotiations on this proposal did not produce an agreement, Transoil sent Belcher a telex rejecting the oil on January 27th. Literally minutes later, Belcher accepted Transoil's offer to correct the oil. Despite its earlier rejection, Transoil sent Belcher a telex two days later offering to accept $284,641.13 plus $1.50 a barrel to correct the quality problem. Belcher did not respond to this offer.

Coincidentally, after January 20, 1986, while Belcher and Transoil negotiated, the world spot market price of oil began to fall. Despite this development, the parties could not agree on the correct test results or a proper settlement. As a result, Transoil brought suit in a Swiss court in February 1986 to block payment of its letter of credit, issued by a Swiss bank. The Swiss court granted Transoil a temporary restraining order but later dissolved it, denying Transoil's application for a temporary

injunction. On February 26, 1986, the Swiss bank paid Belcher's invoice under the letter of credit.

Thereafter, on March 13, 1986, Transoil resold the oil to Statia Terminals for $11 a barrel. From January 19, 1986 to March 13, 1986, the market value of number six oil had fallen from $20 a barrel to $12.25 a barrel.

In April 1986, Transoil brought suit against Belcher for breach of contract. Following a full trial on the merits, the jury found that Belcher had breached its contract by furnishing off-spec oil and awarded Transoil $2,062,000 in damages. The court denied Belcher's motions for judgment notwithstanding the verdict and new trial, and Belcher lodged this timely appeal.

II.

Belcher argues first that the evidence is insufficient to support the jury's determination that Belcher breached its contract with Transoil.

To reverse the district court's denial of Belcher's motion for judgment notwithstanding the verdict, we must be satisfied that the facts and inferences point so strongly in favor of Belcher that reasonable jurors could not reach a contrary verdict. *See Boeing Co. v. Shipman*, 411 F.2d 365, 374-75 (5th Cir.1969). If, however, substantial evidence supports the jury's finding, we must affirm the district court's denial of Belcher's motion. Substantial evidence is "evidence of such quality and weight that reasonable and fair-minded men in the exercise of impartial judgment might reach different conclusions." *Id.*

In reviewing the district court's denial of Belcher's motion for a new trial, on the other hand, we must determine whether the court's ruling is an "abuse of discretion," that is, "clear error." *Eyre v. McDonough Power Equipment, Inc.*, 755 F.2d 416, 420 (5th Cir.1985). A district court abuses its discretion, in denying a motion

for a new trial, if there is an "absolute absence" of evidence to support the jury's verdict. *United States v. An Article of Drug Consisting of 4,680 Pails*, 725 F.2d 976, 990 (5th Cir.1984).

Belcher argues that the jury was not entitled to find that the oil was off-spec because the tests, on which Transoil relies, were not certified by Saybolt NV and did not meet the contract's requirements. We disagree. The contract provides that:

> [i]f either party desires an independent petroleum inspector present at the time of delivery, such inspector shall be appointed jointly, and the cost of his services shall be shared equally by the parties. The inspectors [sic] determinations shall be conclusive and binding upon both parties.

This provision does not require Saybolt NV to "certify" or perform, rather than witness, the testing.

When the oil arrived on St. Eustatius, Saybolt NV collected samples, delivered them to the lab for testing, and then witnessed Statia Labs perform the tests. Once Statia Labs had compiled the results, Saybolt NV issued a "Record of Witnessed Analysis," verifying the results but not their accuracy. The record reflects that this witnessed analysis was Saybolt NV's usual practice and the usual procedure for the Caribbean. The jury was entitled to find that Saybolt NV could not have performed the tests itself because Statia Labs operated the only testing facilities on the island.

In addition, Transoil presented evidence that Belcher knew that Saybolt NV would not actually run the tests in the Caribbean. Several months before this transaction, Belcher had accepted a witnessed analysis from another Saybolt company as dispositive of a Caribbean cargo's quality. Transoil also presented the deposition testimony of a Saybolt NV employee who had advised Belcher that

Saybolt NV would only be providing a witnessed analysis and would not be running the tests.

Belcher argues that, regardless, Statia Labs did not conduct the discharge port tests in accordance with the contract's requirements. The contract required that testing of the quantity and quality of the oil be:

> in accordance with standard test methods specified in the official publications of either the American Society for Testing and Materials (ASTM) or the Institute of Petroleum (IP), whichever are in general use at the discharge terminal. Other appropriate test methods may be used for the qualities where no methods are prescribed in ASTM or IP publications on the date of this Agreement.

In general, St. Eustatius followed the ASTM's standards. However, the ASTM publications no longer prescribed the ASTM D-2788 test, used by Statia Labs. In fact, of all the tests conducted, only the March 1986 Saybolt-Pasadena test followed a prescribed method, IP-288, although others used methods similar to the ASTM/IP methods.

Nevertheless, the jury was entitled to find that the vanadium test, conducted by Statia Labs and witnessed by Saybolt NV, substantially complied with the contract. Transoil's experts testified that this test was the "technical equivalent" of the IP-288 test. Significantly, the jury heard the results from five non-IP-288 tests and one IP-288 test that revealed that the oil's vanadium exceeded 200 ppm. Curiously, despite Belcher's emphasis on the importance of the standards required by the contract, neither of the two tests on which it has relied followed those methods.

Thus, the jury had "substantial evidence" that Belcher breached the contract by shipping off-spec oil to Transoil. Consequently, the district court correctly denied Belcher's motion for judgment notwithstanding the verdict on the liability issue. Furthermore, the same evidence demon-

strates that the district court did not abuse its discretion in denying the motion for a new trial because there was not an "absolute absence" of evidence to support the jury's verdict.

III.

The more difficult question we face is whether the jury properly calculated Transoil's damages. Belcher argues that the award is unsupported by the evidence under the legal theory upon which the case was tried and submitted to the jury. We agree.

The judge instructed the jury that if it found that Belcher breached the contract it must determine whether the breach caused Transoil any damages. On the question of damages, the judge instructed the jury that:

> In general, the applicable Texas law provides damages for breach in the amount of the expectancy interest of the wronged party. In other words, the award of damages is intended to place the victim of the breach in the same position he would have occupied had the breach not occurred.
>
> You are instructed that the term expectancy damage means the general difference in value losses—the difference in value to the wronged party of the goods delivered and the goods as promised under the contract.
>
> You are further instructed that the contract between Transoil and Belcher excludes any additional consequential or incidental damages, including, but not limited to interest, and further excludes any damages because of any particular purpose which Transoil may have had for the goods delivered.

The jury awarded Transoil $2,062,000 in damages.

In this appeal, Transoil and Belcher do not dispute the correctness of the charge, only the proper construction of it. Belcher contends that the judge gave this instruction

pursuant to § 2.714(a) of the Texas Uniform Commercial Code (U.C.C.), which governs the remedies available to a buyer who has *accepted* nonconforming goods.[2] Belcher argues that Transoil, having accepted the oil, could only seek the difference in value between the oil as promised and as delivered. According to Belcher, under the charge, the proper calculation of damages is the difference between the contract price, i.e., the value as promised, and the market price on the date of tender, i.e., the value as delivered. Belcher maintains that the contract price ($19.40/barrel) represents the value of the oil as promised and that the spot market oil price ($20/barrel) represents the value as delivered.

According to Transoil, the judge gave a general charge, justified under several U.C.C. sections. Transoil argues that the award is proper not only under §§ 2.714(a) and (b)[3] when the case is viewed as involving a "forced acceptance" of the oil but also under § 2.711 when the case is viewed as involving a "rejection" or "revocation of acceptance" of the oil.[4] Transoil contends that the

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[2] Section 2.714(a) provides:

> Where the buyer has accepted goods and given notification (Subsection (c) of Section 2.607) he may recover as damages for any non-conformity of tender the loss resulting in the ordinary course of events from the seller's breach as determined in any manner which is reasonable.

V.T.C.A., Bus. & C. § 2.714(a).

[3] Section 2.714(b) provides:

> The measure of damages for breach of warranty is the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted, unless special circumstances show proximate damages of a different amount.

V.T.C.A., Bus. & C. § 2.714(b).

[4] Section 2.711 provides, in part:

> (a) Where the seller fails to make delivery or repudiates or the buyer rightfully rejects or justifiably revokes acceptance then with respect to any goods involved, and with respect to

proper calculation of damages, in light of these sections, is the difference between the contract price, i.e., value as promised, and the resale price, which Transoil contends is equivalent to the value as delivered.

We need not consider the merits of Transoil's argument under § 2.711 because Transoil failed to request an instruction pursuant to this section from the district court. Transoil had the burden of requesting instructions necessary to set out its theory of the case to the jury. *Cf. Farrar v. Cain*, 756 F.2d 1148, 1150-51 (5th Cir. 1985) (failure to object to the jury charge in the trial court precludes appellate review unless the error results in a miscarriage of justice); *Fisher v. Indiana Lumbermens Mutual Insurance Co.*, 456 F.2d 1396, 1400 (5th Cir.1972) (failure to submit a specific instruction to the trial court bars subsequent appellate complaint that the court did not give the requested instruction); 5A James W. Moore, et al., *Moore's Federal Practice* ¶¶ 51.03, 51.04 (2d ed.1991). Transoil did not request, or object to the omission of, an instruction on "rejection," "revocation of acceptance," or "forced acceptance." Thus, even though

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the whole if the breach goes to the whole contract (Section 2.612), the buyer may cancel and whether or not he has done so may in addition to recovering so much of the price as has been paid

(1) "cover" and have damages under the next section as to all the goods affected whether or not they have been identified to the contract; or

(2) recover damages for non-delivery as provided in this chapter (Section 2.713)

* * * * * *

(c) On rightful rejection or justifiable revocation of acceptance a buyer has a security interest in goods in his possession or control for any payments made on their price and any expenses reasonably incurred in their inspection, receipt, transportation, care and custody and may hold such goods and resell them in like manner as an aggrieved seller (Section 2.706).

V.T.C.A., Bus. & C. § 2.711.

Transoil argued facts that suggest rejection and revocation of acceptance as grounds for recovery, the jury never had these legal theories before it.

Under the Texas Uniform Commercial Code, an acceptance theory of recovery is distinct from a rejection or revocation of acceptance theory. A party claiming that it rightfully rejected nonconforming goods must demonstrate that it rejected the goods within a reasonable time following delivery and seasonably notified the seller. V.T.C.A., Bus. & C. § 2.602(a). Revocation of acceptance, on the other hand, requires proof of:

> (1) initial acceptance (with a reasonable assumption that the non-conforming item would be cured and it is not cured, or without discovery of the non-conforming item if acceptance was induced by difficulty of discovery or by seller's assurance); (2) of non-conforming item; (3) such non-conformity substantially impairs value to the buyer; (4) and revocation occurs within a reasonable time; (5) in any event, the revocation must occur before a substantial change in the condition of the good occurs (which change is not caused by defect of the goods).

Neily v. Aaron, 724 S.W.2d 908, 913-14 (Tex.App.—Fort Worth 1987, no writ). *See also* V.T.C.A., Bus. & C. § 2.608. Proof that a party availed itself of one of these two remedies is necessary to permit recovery under § 2.711.

The judge's charge, however, did not instruct the jury to consider any of the elements of either rejection or revocation of acceptance. Also, as noted above, Transoil never requested an instruction on these elements, nor did it object to their omission from the charge. Consequently, Transoil cannot now claim that the jury awarded damages under either of these legal theories because the judge never presented them to the jury.

The district court's damage charge is based, instead, in large part on language taken from *Reynolds Metals Co. v. Westinghouse Elec. Corp.*, 758 F.2d 1073 (5th Cir. 1985). In that case, the plaintiff buyer proceeded against the defendant seller on the theory that the buyer sustained damages when it accepted nonconforming goods. We explained that the expectancy damages the buyer was generally entitled to recover consisted of three principal components:

> (1) general difference-in-value losses—the difference in value to the wronged party of the performance or goods tendered and the performance or goods as promised under the contract; (2) incidental losses—costs incurred in a reasonable effort, whether successful or not, to avoid losses caused by the breach; and (3) consequential losses—items such as lost profits or injuries to person or property foreseeably caused by the breach. *See, e.g.*, Tex.Bus. & Com.Code §§ 2.713, 2.714 (Vernon 1968); Restatement (Second) of Contracts § 347 (1979).

Id. at 1079.

As in *Reynolds*, the contract in today's case excludes recovery of incidental and consequential losses. The district court, therefore, correctly instructed the jury that it could only award difference-in-value losses. Thus, under the charge, Transoil was entitled to recover for any diminution in the oil's value resulting from the oil's nonconformity, that is, its excessive vanadium content. *See Micromedia v. Automated Broadcast Controls*, 799 F.2d 230, 235-36 (5th Cir.1986). We conclude, therefore, that the only legal theory before the jury assumed an acceptance of nonconforming goods, permitting recovery under § 2.714. We next consider whether § 2.714 supports the jury's award.

Transoil argues that even under § 2.714 the award is supported by the record evidence and is reasonable.

Transoil maintained, throughout the trial and on appeal, that the proper calculation of damages is the difference between the oil's promised value ($19.40/barrel) and its resale value ($11/barrel) after the market drop. Transoil contends that the judge's instruction correctly allowed the jury to award the difference between the contract price and the resale price. In fact, the jury's award of $2,062,000 corresponds almost exactly to this difference, $8.40, multiplied by the number of barrels of oil sold, 245,592.

In some situations, the resale price may accurately reflect the value of the goods on the date of delivery and, therefore, may be used in calculating difference-in-value losses. *See, e.g., GNP Commodities, Inc. v. Walsh Heffernan Co.*, 95 Ill.App.3d 966, 51 Ill.Dec. 245, 420 N.E.2d 659 (1981); James J. White and Robert S. Summers, *Uniform Commercial Code* § 10-2 (3d ed. 1988). In this case, however, the resale price is not an appropriate substitute for the oil's value on the date of delivery because in the interim between the delivery and the resale the spot market price of oil fell by nearly $8. *See* Exhibit 335. Thus, the only significance the jury was entitled to attach to the difference between the contract price and the resale price is the change in value of number six oil on the world market. This price spread does not reflect the difference in value of number six oil with a vanadium content below 200 ppm and the value of the same oil with a vanadium content above that level.

If Transoil had resold the oil before January 21, when the market began to collapse, the resale price would have been evidence of the value of the oil on delivery. Moreover, if that resale price was less than $19.40, the jury could have considered whether that difference in prices was a result of the excess vanadium. However, Transoil did not resell the oil until the market collapsed. While Transoil is entitled to any damages it suffered because of the excess vanadium, Transoil introduced no evidence

to demonstrate that the $8.40 difference in the resale price is attributable to the higher vanadium content as opposed to the market's collapse.

In the absence of any proof that the oil sold at a lower price because of its vanadium content, we must conclude that the market's collapse produced the lower resale price. In fact, the expert testimony at trial established that, at the time of delivery, Transoil could have resold the oil at or near the spot market price in several markets even with a vanadium level greater than 200 ppm. Transoil's witnesses testified that the vanadium content affected the value of the oil to Transoil, but they did not say that the excess vanadium altered the oil's value on the open market.

Ordinarily, Transoil could have argued that as a result of the nonconformity it lost its contracts for the sale of the oil. However, as the judge instructed the jury, this contract specifically excluded recovery of such damages. Thus, in order for Transoil to recover, Transoil had to establish that the excess vanadium prevented it from reselling the oil at the prevailing market price. Transoil produced no such evidence.

In fact, the only record evidence relevant to the oil's value, on the date Belcher delivered it, is the Platt's Oilgram price reports. *See* Exhibit 335. According to this index of oil prices, on January 18, 1986, the price of number six oil was $20, which is higher than the contract price. Transoil has not demonstrated that it suffered any damages due to the excess vanadium because some markets would have accepted oil with a vanadium level of more than 200 ppm. Instead, the record reflects that Transoil could have resold the oil, in certain markets, at a price higher than it paid for the oil.

In summary, the evidence presented does not support the jury's award under the legal theory on which the case was submitted to the jury. While it is true that Transoil

requested several different damage instructions, none of these instructions supports recovery. The fact that Transoil now points to a theory of recovery for which the evidence might support recovery is of no moment. Transoil failed to ask the district court to present this theory to the jury and, the jury did not consider the evidence under this theory. We cannot say what findings the jury would have made on the plaintiff's claims under such a theory. Therefore, we cannot sustain the judgment on this theory.

IV.

Having determined that the jury's award of damages to Transoil is not supported by the record, we need not address Belcher's remaining arguments.

For the above reasons we reverse the judgment of the district court and render a take nothing judgment in favor of Belcher.

REVERSED AND RENDERED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Civil Action No. H-86-1509

TRANSOIL (JERSEY) LTD.,
Plaintiff,

v.

BELCHER OIL COMPANY,
Defendant,

v.

E.W. SAYBOLT & COMPANY, INC.; E.W. SAYBOLT & COMPANY, S.A.; and E.W. SAYBOLT & COMPANY (ST. EUSTATIUS) N.V.,
Third-Party Defendants.

FINAL JUDGMENT

[Filed June 7, 1990]

In accordance with the verdict, the Court's April 19, 1990, Order granting in part Defendant's and Third-Party Defendants' Motion for Instructed Verdict, and the Court's Memorandum and Order of even date, the Court ADJUDGES:

(1) that plaintiff, Transoil (Jersey) Ltd., recover from the defendant, Belcher Oil Company

(a) the sum of $2,062,000.00,

(b) prejudgment interest on that amount at the rate of 10% per annum compounded annually from

March 20, 1986, through the date of this judgment,

(c) costs of this action, and

(d) post-judgment interest on such sums at the rate of 8.70%;

(2) that the defendant/counterplaintiff, Belcher Oil Company, recover of the third-party defendant, E.W. Saybolt & Company, Inc., the sum of $2,975.42, with post-judgment interest thereon at the rate of 8.70% as provided by law, each party to bear its own costs and attorneys' fees incurred in connection with this action; and

(3) that the defendant/counterplaintiff, Belcher Oil Company, take nothing from third-party defendants E.W. Saybolt & Company, S.A., and E.W. Saybolt & Company (St. Eustatius), N.V., and that they recover of Belcher Oil Company their costs of this action.

This is a FINAL JUDGMENT.

SIGNED at Houston, Texas, this 31st day of May, 1990.

/s/ Sim Lake
SIM LAKE
United States District Judge

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 90-2629

TRANSOIL (JERSEY) LTD.,
Plaintiff-Appellee, Cross-Appellant,

versus

BELCHER OIL COMPANY,
Defendant-Third Party Plaintiff-Appellant-Cross-Appellee.

Appeal from the United States District Court
for the Southern District of Texas

ON PETITION FOR REHEARING AND SUGGESTION
FOR REHEARING EN BANC

(Opinion January 16, 5 Cir., 1992, —— F.2d ——)

(March 23, 1992)

Before DAVIS and BARKSDALE, Circuit Judges,
SCHWARTZ, District Judge*

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* District Judge of the Eastern District of Louisiana sitting by designation.

PER CURIAM:

(✓) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ W. Eugene Davis
United States Circuit Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

C.A. No. H-86-1509

TRANSOIL (JERSEY) LTD.,
Plaintiff,

vs.

BELCHER OIL COMPANY
Defendant

vs.

E. W. SAYBOLT & COMPANY, INC., *et al.*,
Third-Party Defendants

CHARGE TO THE JURY

[Filed April 17, 1990]

LADIES AND GENTLEMEN OF THE JURY:

Now that you have heard all of the evidence, it becomes my duty to give you the law applicable to this case.

* * * *

If you determine that there has been a breach of contract, you must consider whether the breach has caused TRANSOIL any damages. A mere breach which causes no loss to TRANSOIL cannot sustain a recovery.

In general, the applicable Texas law provides damages for breach in the amount of the expectancy interest of the wronged party. In other words, the award of damages is intended to place the victim of the breach in the same

position he would have occupied had the breach not occurred.

You are instructed that the term expectancy damage means the general difference in value losses—the difference in value to the wronged party of the goods delivered and the goods as promised under the contract.

You are further instructed that the contract between Transoil and Belcher specifically excludes any additional consequential or incidental damages, including, but not limited to interest, and further excludes any damages because of any particular purpose which Transoil may have had for the goods delivered.

If you find that TRANSOIL has shown by a preponderance of the evidence that it suffered damages as described above, then your award should include all damages so proven less any damage suffered by TRANSOIL as a result of its failure to mitigate the loss it suffered as a result of BELCHER's failure to deliver oil conforming with the contract description.

If the alleged breach did not proximately cause the damages claimed by TRANSOIL, then TRANSOIL may not recover for those damages.

* * * *

SIGNED this 17th day of April, 1990.

/s/ Sim Lake
United States District Judge

APPENDIX E

TRANSOIL (JERSEY) LTD.'S PROPOSED JURY INSTRUCTIONS REGARDING DAMAGES

1. Proposed Instruction Filed April 16, 1990

If you determine that there has been a breach of contract, you must consider whether the breach has caused TRANSOIL any damages. A mere breach which causes no loss to TRANSOIL cannot sustain a recovery. In this case, the measure of damage is the difference between the original purchase price and the price at which the nonconforming oil could have been sold in good faith under the circumstances.

If you find that TRANSOIL has shown by a preponderance of the evidence that it suffered damages as described above, then your award should include all damages so proven less any damage suffered by TRANSOIL as a result of its failure to mitigate the loss it suffered as a result of BELCHER's failure to deliver oil conforming with the contract description.

If the alleged breach did not proximately cause the damages claimed by TRANSOIL, then TRANSOIL may not recover for those damages.

2. Proposed Instruction Filed April 17, 1990

If you determine that there has been a breach of contract, you must consider whether the breach has caused TRANSOIL any damages. A mere breach which causes no loss to TRANSOIL cannot sustain a recovery.

In general, the applicable Texas law provides damages for breach in the amount sufficient to place the victim of the breach in the same position it would have occupied had the breach not occurred. In determining the measurement of these damages, the jury may consider those damages resulting in the ordinary course of events, from the seller's breach as determined in any manner which is reasonable.

You are further instructed that the contract between Transoil and Belcher specifically excludes any additional consequential or incidental damages, including, but not limited to interest, and further excludes any consideration of any additional damages which Transoil may have incurred by virtue of a particular use it may have had for the goods delivered.

If you find that TRANSOIL has shown by a preponderance of the evidence that it suffered damages as described above, then your award should include all damages so proven less any damage suffered by TRANSOIL as a result of its failure to mitigate the loss it suffered as a result of BELCHER's failure to deliver oil conforming with the contract description.